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MasTec Services Company, Inc. and Noble Hobbs.
Case 16–CA–086102

December 24, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND HIROZAWA

On June 3, 2013, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief, to which the General Counsel filed an answering brief and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, and to adopt the recommended Order, as modified and set forth in full below.¹

The judge found, applying the Board's decision in *D. R. Horton*, 357 NLRB No. 184 (2012), enf. denied in relevant part, 737 F.3d 344 (5th Cir. 2013),² that the Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a Dispute Resolution Policy (Policy) that requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial.³

¹ We shall modify the judge's recommended Order to conform to the Board's standard remedial language for the violation found, and we shall substitute a new notice to conform to the Order as modified and in accordance with *Durham School Services, L.P.*, 360 NLRB No. 85 (2014).

² In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by maintaining the Dispute Resolution Policy, we do not rely on the judge's statement that *D. R. Horton* is "clearly distinguishable." The judge correctly applied the principles of *D. R. Horton* in finding the Policy unlawful.

³ Our dissenting colleague observes that the Act does not dictate any particular procedures for the litigation of non-NLRA claims, and "creates no substantive right for employees to insist on class-type treatment" of such claims. This is all surely correct, as the Board has previously explained in *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. at 2 (2014), enf. denied in relevant part, ___ F.3d ___ (5th Cir. Oct. 26, 2015), and *Bristol Farms*, 363 NLRB No. 45, slip op. at 2 and fn. 2 (2015). But what our colleague ignores is that the Act does "creat[e] a right to pursue joint, class, or collective claims if and as available without the interference of an employer-imposed restraint." *Murphy Oil*, supra, slip op. at 2. The Respondent's Policy is just such an unlawful restraint. For the same reason, we find no merit in the Respondent's argument that *D. R. Horton* and *Murphy Oil* conflict with the Rules Enabling Act (REA). As we explained in *Murphy Oil*, supra, slip op. at

In *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied in relevant part, ___ F.3d ___ (5th Cir. Oct. 26, 2015), the Board reaffirmed the relevant holdings of *D. R. Horton*, supra. Based on the judge's application of *D. R. Horton*, and on our subsequent decision in *Murphy Oil*, we affirm the judge's findings and conclusions,⁴ and

2, 14, 16–17, the substantive Sec. 7 right to pursue employment-related claims collectively, without employer interference or restraint, is distinct from the procedural rules governing class certification. For this reason, we reject the Respondent's contention that *D. R. Horton* and *Murphy Oil* attempted to interpret FRCP Rule 23 or to define the scope of employees' procedural rights in conflict with the REA.

⁴ For the reasons stated in *Murphy Oil*, supra, we reject the Respondent's contentions that *D. R. Horton* was not decided by a validly appointed Board, that it was wrongly decided and should be overruled, and that its holding is inconsistent with Supreme Court decisions regarding the Federal Arbitration Act. The Respondent's exceptions that the Board and the administrative law judge acted without authority in this case because the Board lacked a valid quorum when the complaint issued are also without merit. See *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, slip op. at 1 fn. 3 (2015).

We reject the Respondent's argument that the judge erred by failing to find that its non-Board settlement with the Charging Party satisfied the standard established by *Independent Stave Co.*, 287 NLRB 740 (1987). Because the parties' settlement provides no remedy for the Respondent's unfair labor practice, approval of the settlement would not effectuate the purposes of the Act. See *Flyte Tyme Worldwide*, 362 NLRB No. 46, slip op. at 1–2 & fn. 1 (2015).

The Respondent argues that its Policy includes an exemption allowing employees to file charges with administrative agencies, including with the Board, and thus does not, as in *D. R. Horton*, unlawfully prohibit them from collectively pursuing litigation of employment claims in all forums. See *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053–1054 (8th Cir. 2013). We reject this argument for the reasons stated in *SolarCity Corporation*, 363 NLRB No. 83 (2015).

Contrary to the Respondent and our dissenting colleague, we reject the contention that the availability of permissive joinder under state procedural rules renders the Policy lawful. Even if we assumed that permissive joinder is an otherwise lawful option, the Policy contains a confidentiality provision that prohibits the disclosure of the "existence, content, or results of any arbitration" absent written consent of all parties. Such a prohibition would render joinder illusory. As such, the Policy fails under the reasoning set forth in *D. R. Horton* and *Murphy Oil*. See *24 Hour Fitness*, 363 NLRB 84 (2015).

The Respondent contends that its Policy, which includes an opt-out provision, is voluntary and therefore does not fall within the proscriptions of *Murphy Oil* and *D. R. Horton*, which involved agreements that were imposed on employees as a condition of employment. See *D. R. Horton*, slip op. at 13 fn. 28. The Board has rejected this argument, holding that an opt-out procedure still imposes an unlawful mandatory condition of employment that falls squarely within the rule of *D. R. Horton* and affirmed in *Murphy Oil*. See *On Assignment Staffing Services*, 362 NLRB No. 189, slip op. at 1, 4–5 (2015); *Nijjar Realty d/b/a Pama Management*, 363 NLRB No. 38, slip op. at 2 (2015). The Board further held in *On Assignment Staffing Services*, slip op. at 1, 5–8, that even assuming that an opt-out provision renders an arbitration policy not a condition of employment (or non-mandatory), an arbitration policy precluding collective action in all forums is unlawful even if entered into voluntarily because it requires employees to prospectively waive their Sec. 7 right to engage in concerted activity. Contrary to the Respondent and our dissenting colleague, we find no merit in the contention that the opt-out provision is necessary to safeguard employees'

adopt the recommended Order as modified and set forth in full below.⁵

ORDER

The National Labor Relations Board orders that the Respondent, MasTec Services Company, Inc., Fort Worth, Texas, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Maintaining a mandatory Dispute Resolution Policy that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the Dispute Resolution Policy in all of its forms, or revise it in all of its forms to make clear to employees that the Dispute Resolution Policy does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums.

(b) Notify all current and former employees who were required to sign or otherwise become bound to the unlawful Dispute Resolution Policy that it has been rescinded or revised and, if revised, provide them a copy of the revised Dispute Resolution Policy.

(c) Within 14 days after service by the Region, post at its Fort Worth, Texas facility, and at all other facilities where the unlawful Dispute Resolution Policy is or has been in effect, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be

posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 26, 2012.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 16 sworn certifications of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., December 24, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

In this case, my colleagues find that the Respondent's Dispute Resolution Policy (Policy) violates Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) because the Policy waives the right to participate in class or collective actions regarding non-NLRA employment claims. I respectfully dissent from this finding for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc.*¹

I agree that an employee may engage in "concerted" activities for "mutual aid or protection" in relation to a

Sec. 7 right to "refrain from" engaging in protected concerted activity. See *Murphy Oil*, supra, slip op. at 18; *Bristol Farms*, supra, slip op. at 2. Nor is our dissenting colleague correct in insisting that Sec. 9(a) of the Act requires the Board to permit individual employees to prospectively waive their Sec. 7 right to engage in concerted legal activity. See *Murphy Oil*, slip op. at 17-18; *Bristol Farms*, slip op. at 2. As we held in *Bristol Farms*, slip op. at 2, "agreements in which individual employees purport to give up the statutory right to act concertedly for their mutual aid or protection are void."

⁵ Because the record evidence does not support a finding that the Respondent enforced the Dispute Resolution Policy, we shall modify the judge's recommended Order to delete the requirement that the Respondent notify arbitral or judicial panels where it has attempted to enjoin or prohibit employees from pursuing class or collective actions that it is withdrawing those objections and that it no longer objects to such actions.

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹ 361 NLRB No. 72, slip op. at 22-35 (2014) (Member Miscimarra, dissenting in part). The Board majority's holding in *Murphy Oil* invalidating class-action waiver agreements was recently denied enforcement by the Court of Appeals for the Fifth Circuit. *Murphy Oil USA, Inc. v. NLRB*, No. 14-60800, 2015 WL 6457613 (5th Cir. Oct. 26, 2015).

claim asserted under a statute other than NLRA.² However, I disagree with my colleagues' finding that Section 8(a)(1) of the NLRA prohibits agreements that waive class and collective actions,³ and I especially disagree with the Board's finding here, similar to the Board majority's finding in *On Assignment Staffing Services*,⁴ that class waiver agreements violate the NLRA even when they contain an opt-out provision. In my view, Sections 7 and 9(a) of the NLRA render untenable both of these propositions. As discussed in my partial dissenting opinion in *Murphy Oil*, NLRA Section 9(a) protects the right of every employee as an "individual" to "present" and "adjust" grievances "at any time."⁵ This aspect of Section 9(a) is reinforced by Section 7 of the Act, which protects each employee's right to "refrain from" exercising the collective rights enumerated in Section 7. Thus, I believe it is clear that (i) the NLRA creates no substantive right for employees to insist on class-type treatment

² I agree that non-NLRA claims can give rise to "concerted" activities engaged in by two or more employees for the "purpose" of "mutual aid or protection," which would come within the protection of NLRA Sec. 7. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 23–25 (Member Miscimarra, dissenting in part). However, the existence or absence of Sec. 7 protection does not depend on whether non-NLRA claims are pursued as a class or collective action, but on whether Sec. 7's statutory requirements are met—an issue separate and distinct from whether an individual employee chooses to pursue a claim as a class or collective action. *Id.*; see also *Beyoglu*, 362 NLRB No. 152, slip op. at 4–5 (2015) (Member Miscimarra, dissenting).

³ Because I disagree with the Board's decisions in *Murphy Oil*, above, and *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. denied in part, 737 F.3d 344, 362 (5th Cir. 2013), and I believe the NLRA does not render unlawful arbitration agreements that provide for the waiver of class-type litigation of non-NLRA claims, I find it unnecessary to reach whether such agreements should independently be deemed lawful to the extent they "leave[] open a judicial forum for class and collective claims," *D. R. Horton*, 357 NLRB No. 184, slip op. at 12, by permitting the filing of complaints with administrative agencies that, in turn, may file class or collective action lawsuits, see *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013).

⁴ 362 NLRB No. 189, slip op. at 1, 4–5 (2015).

⁵ *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. at 30–34 (2014) (Member Miscimarra, dissenting in part). Sec. 9(a) states: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment" (emphasis added). The Act's legislative history shows that Congress intended to preserve every individual employee's right to "adjust" any employment-related dispute with his or her employer. See *Murphy Oil*, above, slip op. at 31–32 (Member Miscimarra, dissenting in part).

of non-NLRA claims;⁶ (ii) a class-waiver agreement pertaining to non-NLRA claims does not infringe on any NLRA rights or obligations, which has prompted the overwhelming majority of courts to reject the Board's position regarding class waiver agreements;⁷ (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA);⁸ and (iv) for the reasons stated in my dissenting opinion in *Nijjar Realty d/b/a Pama Management*, 363 NLRB No. 38, slip op. at 3–5 (2015), the legality of such a waiver is even more self-evident when the agreement contains an opt-out provision, based on every employee's Section 9(a) right to present and adjust grievances on an "individual" basis and each employee's Section 7 right to "refrain from" engaging in protected concerted activities.⁹ Although questions may arise regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims, I believe these questions are exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims.

Accordingly, I respectfully dissent.

⁶ When courts have jurisdiction over non-NLRA claims that are potentially subject to class treatment, the availability of class-type procedures does not rise to the level of a substantive right. See *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) ("The use of class action procedures . . . is not a substantive right.") (citations omitted); petition for rehearing en banc denied No. 12–60031 (5th Cir. 2014); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.").

⁷ The Fifth Circuit has twice denied enforcement of Board orders invalidating a mandatory arbitration agreement that waived class-type treatment of non-NLRA claims. See *Murphy Oil USA, Inc. v. NLRB*, above; *D.R. Horton, Inc. v. NLRB*, above. The overwhelming majority of courts considering the Board's position have likewise rejected it. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 34 (Member Miscimarra, dissenting in part); *id.*, slip op. at 36 fn. 5 (Member Johnson, dissenting) (collecting cases); see also *Patterson v. Raymours Furniture Co., Inc.*, No. 14–CV–5882 (VEC), 2015 WL 1433219 (S.D.N.Y. Mar. 27, 2015); *Nanavati v. Adecco USA, Inc.*, No. 14–cv–04145–BLF, 2015 WL 1738152 (N.D. Cal. Apr. 13, 2015), motion to certify for interlocutory appeal denied 2015 WL 4035072 (N.D. Cal. June 30, 2015); *Brown v. Citicorp Credit Services, Inc.*, No. 1:12–cv–00062–BLW, 2015 WL 1401604 (D. Idaho Mar. 25, 2015) (granting reconsideration of prior determination that class waiver in arbitration agreement violated NLRA).

⁸ For the reasons expressed in my *Murphy Oil* partial dissent and those thoroughly explained in former Member Johnson's dissent in *Murphy Oil*, the FAA requires that the arbitration agreement be enforced according to its terms. *Murphy Oil*, above, slip op. at 34 (Member Miscimarra, dissenting in part); *id.*, slip op. at 49–58 (Member Johnson, dissenting).

⁹ The lawfulness of the Policy is all the more apparent based on the fact that it incorporates procedural rules that allow for permissive joinder of individual claims.

Dated, Washington, D.C. December 24, 2015

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory Dispute Resolution Policy that requires you, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the unlawful Dispute Resolution Policy in all of its forms, or revise it in all of its forms to make clear that the Dispute Resolution Policy does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the unlawful Dispute Resolution Policy that it has been rescinded or revised and, if revised, provide them a copy of the revised Dispute Resolution Policy.

MASTEC SERVICES CO.

The Board's decision can be found at www.nlrb.gov/case/16-CA-086102 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations

Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Kelly Elifson, Esq., for the General Counsel.
Stefan Marculewicz, Esq. and Steven Kaplan, Esq. (Littler Mendelson, P.C.), for the Respondent.
Trang Tran, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge: The parties herein waived a hearing and submitted this case directly to me by way of a joint motion and stipulation of facts dated April 19, 2013. The Complaint herein, which issued on February 26, 2013, and was based upon an unfair labor practice charge that was filed on July 26, 2012,¹ by Noble Hobbs, alleges that Mastec Services Company, Inc., herein called Respondent, maintained and enforced an employee handbook setting forth terms and conditions of employment requiring employees to resolve all employment related disputes by individual arbitration and forego any rights that they had to resolution of employment-related disputes by collective or class action. The complaint also alleges that the Respondent required employees to sign an employee handbook acknowledgement form providing that employees would be bound to the Arbitration Policy described above, unless they opt out of the policy within 30 days of receiving the employee handbook. This is alleged to violate Section 8(a)(1) of the Act.

The joint stipulation provides as follows:

1. At all material times, Respondent has been a Florida corporation with a facility located in Ft. Worth, Texas, and has been engaged in the business of installing satellite television services.

2. In conducting its operations during the 12 month period ending January 31, 2013, Respondent sold and shipped from its Ft. Worth, Texas facility goods valued in excess of \$50,000 directly to points outside the State of Texas.

3. In conducting its operations during the 12 month period ending January 31, 2013, Respondent purchased and received at its Ft. Worth, Texas facility goods valued in excess of \$50,000 directly from points outside the State of Texas.

4. At all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

5. At all material times, the following individuals have been

¹ Unless indicated otherwise, all dates referred to herein relate to the year 2012.

supervisors within the meaning of Section 2(11) of the Act and/or agents of Respondent within the meaning of Section 2(13) of the Act:

| | |
|-----------------------|----------------------------------|
| Jose R. Mas | Chief Executive Officer |
| Olga Lisa Stone-Velez | Regional Human Resources Manager |
| David Pressley | Metrics Performance Manager |

6. At all material times, Respondent has maintained and enforced an employee handbook setting forth terms and conditions of employment, which include a dispute resolution policy (the Arbitration Policy) that requires its employees at all of its facilities located throughout the United States to resolve all employment related disputes by individual arbitration and forego any rights they have to resolution of employment-related disputes by collective or class action.

7. At all material times, Respondent has required employees at all of its facilities located throughout the United States to sign an employee handbook acknowledgement form, which provides that employees would be bound to the Arbitration Policy described above, unless they opt out within 30 days of receiving the employee handbook.

8. On September 12, 2007, Charging Party signed an employee handbook acknowledgement form.

9. Charging Party did not opt out of the Arbitration Policy within 30 days of receiving the employee handbook.

10. Respondent terminated Charging Party in November 2009.

11. In July 2012, Charging Party, via his Counsel Trang Q. Tran, asserted a claim against Respondent concerning a wage dispute, and submitted a demand for arbitration in accordance with the terms of the Arbitration Policy.

12. Pursuant to the Arbitration Policy, and the facts set forth above in Paragraphs 6 through 9, Respondent maintained that Charging Party could not sue in a collective action and instead could only pursue his claim through an individual arbitration.

13. Prior to proceeding with the arbitration, Respondent and Charging Party settled his claim.

14. In connection with the settlement of his claim, Charging Party submitted a request to withdraw his unfair labor practice charge.

15. The Regional Director has not approved Charging Party's request to withdraw the charge because under the terms of the settlement of Charging Party's wage claim, there is no provision that addresses or remedies Respondent's maintenance and enforcement of the Arbitration Policy as alleged above in paragraphs 6 and 7, at issue in this case.

The Dispute Resolution Policy, at issue herein, states as follows:

This Dispute Resolution Policy is governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq. This Policy applies to any dispute arising out of or related to Employee's employment with the Company or termination of employment. Except as it otherwise provides, this Policy requires all such disputes that have not otherwise been resolved to be resolved only by an arbitrator through final and binding arbitration and not by way of court or jury trial. Such disputes include, without limitation, disputes arising out of or relating to interpretation or ap-

plication of this Policy, but not as to the enforceability or validity of the Policy or any portion of the Policy. The Policy also applies, without limitation, to disputes regarding, the employment relationship, trade secrets, unfair competition, compensation, breaks and rest periods, termination, or harassment and claims arising under the Uniform Trade Secrets Act; Civil Rights Act of 1964, Americans With Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Employee Retirement Income Security Act, and state statutes, if any, addressing the same or similar subject matters, and all other state statutory and common law claims (excluding workers compensation, state disability insurance and unemployment insurance claims). Claims arising under any law that permits resort to an administrative agency notwithstanding an agreement to arbitrate those claims may be brought before that agency as permitted by that law, including without limitation claims or charges brought before the National Labor Relations Board, the Equal Employment Opportunity Commission, and the United States Department of Labor. Nothing in this Policy shall be deemed to preclude or excuse a party from bringing an administrative claim before any agency in order to fulfill the party's obligation to exhaust administrative remedies before making a claim in arbitration.

A neutral arbitrator shall be selected by mutual agreement of the parties. The location of the arbitration proceeding shall be in the general geographical vicinity of the place where the Employee last worked for the Company, unless each party to the arbitration agrees in writing otherwise. If for any reason the parties cannot agree to an arbitrator, either party may apply to a court of competent jurisdiction for appointment of a neutral arbitrator. The court shall then appoint an arbitrator, who shall act under this Policy with the same force and effect as if the parties had selected the arbitrator by mutual agreement.

A demand for arbitration must be in writing and delivered by hand or first class mail to the other party within the applicable statute of limitations period. Any demand for arbitration made to the Company shall be provided to the Company's Legal Department, 800 Douglas Road, 11th Floor, Coral Gables, Florida 33134. The arbitrator shall resolve all disputes regarding the timeliness or propriety of the demand for arbitration.

In arbitration, the parties will have the right to conduct civil discovery and bring motions, as provided by the forum state's procedural rules. However, there will be no right or authority for any dispute to be brought, heard or arbitrated as a class or collective action, or in a representative or private attorney general capacity on behalf of a class of persons or the general public.

Each party will pay the fees for his, her or its own attorneys, subject to any remedies to which that party may later be entitled under applicable law. However, in all cases where required by law, the Company will pay the Arbitrator's and arbitration fees. If under applicable law the Company is not required to pay all of the Arbitrator's and/or arbitration fees, such fee(s) will be apportioned between the parties by the Ar-

bitrator in accordance with said applicable law.

Within 30 days of the close of the arbitration hearing, any party will have the right to prepare, serve and file with the Arbitrator a brief. The Arbitrator may award any party any remedy to which that party is entitled under applicable law, but such remedies shall be limited to those that would be available to a party in a court of law for the claims presented to and decided by the Arbitrator. The Arbitrator will issue a decision or award in writing, stating the essential findings of fact and conclusions of law. Except as may be permitted or required by law, neither a party nor an Arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of all parties. A court of competent jurisdiction shall have the authority to enter a judgment upon the award made pursuant to the arbitration.

An Employee may submit a form stating that the Employee wishes to opt out and not be subject to this Policy. The Employee must submit a signed and dated Statement on a "Dispute Resolution Policy Opt Out" form ("Form") that can be obtained from the Company's Legal Department, 800 Douglas Road, 11 th Floor, Coral Gables, Florida 33134, by calling 305-406-1875. In order to be effective, the signed and dated Form must be returned to the Legal Department within 30 days of the Employee's receipt of this Policy. An Employee choosing to opt out will not be subject to any adverse employment action as a consequence of that decision.

This Policy is the full and complete policy relating to the formal resolution of employment-related disputes. Nothing contained in this Policy shall be construed to prevent or excuse an Employee from utilizing the Company's existing internal procedures for resolution of complaints.

The Employee Acknowledgement states:

Each employee receiving this Handbook is required as a condition of his or her employment to acknowledge receipt of the Handbook by signing and dating this form where indicated and by returning the form to the Human Resources Contact.

I acknowledge that on the date recorded below I received the MasTec Employee Handbook ("Handbook"). I acknowledge that the Handbook describes the terms and conditions of my employment with MasTec and that I will review the Handbook immediately.

I understand that my employment with MasTec is at-will, meaning that it is not for a specified period of time. The employment relationship may be terminated at any time for any reason, with or without cause or notice, by me or the Company. I acknowledge that no oral or written statements or representations regarding my employment can alter the foregoing. Only the Chief Executive Officer and the Group President have the authority to modify the at-will employment relationship, and then only in writing, signed by either the CEO or the Group President.

I further acknowledge that the Handbook contains a Dispute Resolution Policy on pages 40-41. That Dispute Resolution Policy provides for final and binding arbitration of designated

employment-related disputes. I will review the Dispute Resolution Policy immediately, and I understand I may discuss it with my private legal counsel should I so desire. I acknowledge that I have thirty (30) days from the date of my receipt of the Handbook to decide whether I wish to accept the Dispute Resolution Policy or to opt out of being bound by that Policy. If I choose to opt out I understand that I must return a signed and dated form to that effect to the Company's Legal Department within the 30-day period as provided in the Dispute Resolution Policy. If I do not return that form within the specified period of time, the Dispute Resolution Policy will apply to both MasTec and me.

Finally, I understand that the foregoing agreement concerning my employment-at-will status is the sole and entire agreement between me and MasTec concerning the duration of my employment and the circumstances under which my employment may be terminated. I further understand that this agreement supersedes all prior agreements, understanding, and representations concerning these issues.

Analysis

The issue herein is whether the Respondent's Dispute Resolution Policy, together with the Employee Acknowledgement ("the opt out policy") violates Section 8(a)(1) of the Act. In support of this allegation, counsel for the General Counsel cites *D. R. Horton*, 357 NLRB No. 184 (2012), where the Board found a similar, but not identical policy to violate Section 8(a)(1) of the Act. *Horton* is clearly distinguishable because the policy there included the prohibition precluding employees from filing joint, class or collective claims against the employer addressing wages, hours or working conditions in any forum, arbitral or judicial, including the Board. In addition, the *Horton* policy did not contain an opt-out provision.

The Respondent's Dispute Resolution Policy states that all employment disputes with the Respondent must be resolved before an arbitrator, specifically including claims arising under the Uniform Trade Secrets Act, Civil Rights Act of 1964, Americans with Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Employee Retirement Income Security Act, and similar state or common law claims, but not including worker's compensation, state disability insurance, and unemployment insurance claims, while also allowing "claims arising under any law that permits resort to an administrative agency..." including the Board, the Department of Labor and the EEOC. However, the policy also prohibits class or collective actions and actions on behalf of a class of persons or the general public, and prohibits the parties and the arbitrator from disclosing the existence, content or results of the arbitration without the prior consent of all parties to the arbitration. Finally, the policy and the Acknowledgement provides that employees may choose whether to accept or opt out of the policy, but in order to opt out, they must do so, in writing, within 30 days of receipt of the handbook setting forth the policy.

The Board has long held that concerted legal action addressing wages, hours and working conditions, whether in a courtroom setting, before an administrative agency, or through arbitration, represents protected concerted activities under Section

7 of the Act. *Horton*, supra, at p. 2–3, and *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–566 (1978), where the Court stated, “it has been held that the ‘mutual protection’ clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums.” Respondent defends that even if *Horton* was decided correctly, and even if the Board had the authority to decide it, citing *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010) and *Noel Canning v. NLRB*, 2013 U.S. App. LEXIS 1659 (D.C. Cir. January 25, 2013), the instant matter is “fundamentally different” from *Horton* because Respondent’s policy had the opt out provision. Therefore, Respondent argues, this was not a *mandatory* prohibition as was the case in *Horton*: “Here the Charging Party had the right to opt out of the Policy within thirty days of his receipt of the Employee Handbook and, thereby, could have maintained the right to pursue claims in court- whether as an individual litigant or as a participant in a class or collective action [emphasis supplied]—if he so chose.”

I find that Respondent’s Dispute Resolution Policy, even with the opt out provision, violates Section 8(a)(1) for the following reasons. The Act grants to employees the right to engage in protected concerted activities without interference by his/her employer. As these rights are granted by the Act, an employer may not lawfully require its employees to affirmatively act (opt out, in writing, within thirty days of receipt of the Employee Handbook) in order to obtain or maintain these rights. *Ishikawa Gasket America, Inc.*, 337 NLRB 175–176 (2001). Further, employees who do opt out are unable to cooperate and engage in concerted activities with those employees who did not opt out; they cannot engage in class actions with them and, pursuant to the terms of the Policy, they cannot learn of the existence, content or results of prior arbitrations that the non-opt out employees were involved in. This would clearly put them at a disadvantage in their attempts to engage in concerted actions.

Finally, I find that some employees might be reluctant to exercise the opt out option for fear of angering their employer. Opting out requires the employee to obtain a Dispute Resolution Policy Opt Out form from the Respondent’s Legal Department, and sign and return it to the Legal Department within thirty days of receipt of the policy. Counsel for the Respondent, in his brief, argues that the opt-out procedure provides that the employee obtain the opt-out forms from the Respondent’s legal department and return it to the same department, rather than his/her supervisor or manager; therefore, the supervisors and managers would not know which employees elected to opt-out. Further, the next to final paragraph of the Policy states that employees choosing to exercise their right to opt-out will not be subject to any adverse employment action for doing so. Regardless, employees choosing to exercise their right to opt-out, might have reason to fear the effects of doing so, even if the forms do not come from or go to their supervisor or manager. Whereas employees who do not opt out of the policy do nothing to signify that, those who opt out must affirmatively do so and may fear standing out for asserting their rights. Counsel for the Respondent in his brief also cites Court decisions upholding the class action waiver agreements allowing employees to ei-

ther adopt or decline the provision; however, as counsel for the General Counsel states in her brief, since the Board’s decision in *D.R. Horton*, that issue is for the Board to decide, not the administrative law judge. I therefore find that Respondent’s Dispute Resolution Policy violates Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Jose R. Mas, Olga Lisa-Stone-Velez and David Pressley have been supervisors and/or agents of the Respondent within the meaning of Section 2(11) and (13) of the Act.

3. The Dispute Resolution Policy maintained by the Respondent violates Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has violated the Act by maintaining the Dispute Resolution Policy I recommend that Respondent be ordered to cease and desist from enforcing this policy, and to post the Board Notice set forth below at each of its locations where the Dispute Resolution Policy is in effect. Further, I recommend that Respondent be ordered to notify all arbitral and judicial panels where it has attempted to enjoin, or otherwise prohibit, employees from bringing or participating in class or collective actions, that it withdrawing these objections and that it no longer objects to such employee actions.

Upon the foregoing findings of fact, conclusions of law and based upon the entire record, I hereby issue the following recommended²

ORDER

The Respondent, Mastec Services Company, Inc., Fort Worth, Texas, its officers, agents, successors and assigns, shall

1. Cease and desist from:

(a) Maintaining or enforcing its Dispute Resolution Policy.

(b) In any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Notify all employees at locations where the Policy is in effect, that it will no longer maintain or enforce the provisions contained in the Dispute Resolution Policy referred to in the employee handbook that prohibits employees from bringing or participating in class or collective actions in an arbitral or judicial forum relating to wages, hours or terms and conditions of employment.

(b) Notify arbitral or judicial panels, if any, where the Respondent has attempted to enjoin or otherwise prohibit employees from bringing or participating in class or collective actions, that it is withdrawing those objections and that it no longer objects to such employee actions.

(c) Within 14 days after service by the Region, post at each

² If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

of its facilities where the Dispute Resolution Policy is maintained or enforced, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 26, 2012.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 3, 2013

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce the Dispute Resolution Policy referred to in the Employees' Handbook as far as it prohibits you from bringing or participating in class or collective actions relating to your wages, hours, or terms and conditions of employment in arbitrations or court actions and WE WILL NOT prohibit you from disclosing the existence, contents, or results of any arbitration that you participated in and WE WILL delete these provisions from our Employee Handbook.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your exercise of rights guaranteed you by law.

WE WILL notify any arbitral or judicial panel where we have attempted to prevent or enjoin you from commencing, or participating in, joint or class actions relating to wages, hours or other terms and conditions of employment that we are withdrawing our objections to these actions, and WE WILL no longer object to you bringing or participating in such class or collective actions.

MASTEC SERVICES CO.